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IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, *Appellant*,
v.
THE UNITED STATES. } No. 95.

Appeals From the Court of Claims.

BRIEF IN REPLY.

Ten Per Cent Increase of Pay Proper.

Correction as to Rate of Payment.

In the brief for the United States (paragraph at top of page 8), it is stated that the claimant as a captain in the Navy receives the sea pay of a captain allowed by the old law (Revised Statutes, sec. 1556), under the proviso of the Personnel Act (brief for U. S. foot of page 5): "That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy."

This is an error. The claimant as a captain receives the same pay as a colonel in the Army of similar length of service, under the opening clause of the Personnel Act (brief for U. S. pp. 4, 5), that is:

Minimum or grade pay, R. S. sec. 1261	$3,500
Longevity pay, after 15 years' service, R. S. secs. 1262, 1267	1,000
	$4,500

All captains in the Navy on the active list receive this as all have over fifteen years' service. The amount is the same as the old navy pay under R. S. sec. 1556. Therefore no question under the proviso referred to is involved in this case.

The Army Acts are General in Terms.

It is insisted on behalf of the United States (brief for U. S. pp. 9–12) that the acts of 1900 and 1901 (brief for Charles M. Thomas, claimant, pp. 9, 10) are not general legislation affecting all officers of the Army but affecting only "particular or specific officers serving in specific and designated localities" (brief for U. S. p. 10).

It is difficult to understand the meaning of the terms "particular or specific officers." The legislation is in every sense general in its terms. Every officer of the Army, while serving in the localities designated in the act of 1900, became entitled to the increased pay. So too every officer serving anywhere beyond the limits of the States and Territories becomes entitled under the act of March 2, 1901, to the increased pay while so serving. There is nothing special or particular about these acts. They merely designate the field of service for the application of the increase.

They are the same kind of general law as Rev. Stat. sec. 1578, which provides:

"All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel."

This provision was general and affected all officers of the Navy whenever they came within the condition designated in the statute of being at sea or attached to a seagoing vessel. This court has held that being general legislation relating to pay and allowances of commissioned officers of the Navy, it has been repealed by the general terms of Section 13 of the Navy Personnel Act, that officers of the Navy "shall receive the same pay and allowances" as officers of the Army. (*Gibson* v. *United States*, 194 U. S. 182, 191). The same line of argument leads irresistibly to the conclusion that an act which increases the pay of officers of the Army doing duty in a prescribed field of service is a general law affecting the Army which must necessarily be applied to the Navy also under the terms of the Personnel Act.

Alleged Legislative Construction.

This subject is treated at some length in the brief for the United States (pp. 13–19).

The Naval Appropriation Act of March 3, 1901 (31 Stat. L. 1108) has been discussed in our opening brief (pp. 33–38). This act declares that shore duty in the Philippines and elsewhere is "shore duty beyond seas"; it directs that the pay for such shore duty shall be the full 100 per cent already granted by the second proviso of the Personnel Act, §13, for such shore duty (brief for Thomas, claimant, top of p. 9), and not reduced to 85 per cent under the operation of the first proviso for officers "on shore" (brief for Thomas, claimant, foot of p. 8). It then incidentally adds, "with such additional pay as may be provided by law for service in island possessions of the United States" (brief for Thomas, claimant, p. 34). This clause recognizes the application of the existing act of May 26, 1900, and incidentally also of the contemporary act of March 2, 1901 (brief for Thomas, claimant, p. 9), to

the Navy, but does not undertake to determine, much less to limit, their scope.

That act relates to shore duty pay. Its object was to make a broad definition of the second proviso of the 13th section of the Personnel Act and to limit the scope of the first proviso (brief for Thomas, claimant, p. 8). It refers but incidentally to the ten per cent increase in its particular relation to the subject of the act, shore duty. The present claim arises out of services at sea and therefore depends on the opening clause of section 13, and has no relation to the provisos. It appeals for the general enforcement of the ten per cent increase in accordance with its terms.

The appropriation act of June 7, 1900 (31 Stat. L. 684), referred to in the brief for the United States (pp. 17, 18) as not having provided for the payment of this increase to officers of the Navy has no bearing on the discussion. The pay of the Navy is not, as in the Army appropriation acts, segregated into items. The first item in the act is:

"Pay and allowances prescribed by law of officers on sea duty; officers on shore and other duty; officers on waiting orders; officers on the retired list;" and after a number of other items, the total is given, $12,810,897.

As the appropriation is for "pay and allowances prescribed by law" it throws no light upon the question of what pay and allowances are so prescribed, but the law prescribing the pay and allowances must be referred to.

The same is true of all the subsequent appropriation acts, 1901 (31 Stat. L. 1107), 1902 (32 Stat. L. 662), 1903 (32 Stat. L. 1177), and 1904 (33 Stat. L. 324).

Is Sea Duty Discriminated Against?

The real question is, "Are officers at sea precluded by the character of their service from the benefit of the increase?" Does this act make an implied exception against officers at sea?

The construction demanded by the learned Assistant Attorney-General, if the pay of an army officer on duty in the United States is taken as 100 per cent, would allow to the officer of the Navy on shore duty beyond the States and Territories 110 per cent, and would give to the officer of the Navy on sea duty beyond those limits only 100 per cent. This would reverse the long continued rule of legislation never to grant less, and generally more, for sea than for shore service in the Navy, a policy stated by this court in *Rodgers* v. *United States* (185 U. S. 83, 92), and more elaborately by the Court of Claims in *Ryan* v. *United States* (38 C. Cls. 143) fully quoted in the brief for the United States (pp. 34–39).

Have we in this legislation a solitary example of a discrimination in favor of shore service and against sea service?

This court has held that "an extraordinary change in the usual ruling governing the tenure of office" is not to be presumed to have been intended by Congress "without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences." (*Shurtleff* v. *United States*, 189 U. S. 316). The same remark applies to a construction of acts of Congress which would result in giving an officer on shore duty ten per cent more pay than his brother officer serving at sea in the waters of the same locality.

The Effect of the Act of March 2, 1901.

It is suggested (brief for the United States, p. 19) that nearly all officers of the Navy on sea service are beyond the limits named in the statute and therefore, on the construction of the claimant, would receive ten per cent increase (foot of p. 20). Not only is no evidence offered in support of this mere assertion, but it is conclusively contradicted by official records fully summarized in our opening brief (pp. 28–32). The argument, being thus

contradicted by facts of record, needs but little further consideration.

The Caribbean Maneuvers as a Test.

The suggestion is made in the brief for the United States, pp. 19, 20:

"All those naval officers of that portion of our Navy which recently took part in the maneuvers in the Caribbean Sea and other places for drill and practice, would be entitled to the increase under claimant's contention."

This statement is true. It affords an excellent basis of comparison between the pay of officers of the Army and of the Navy serving beyond the limits of the United States. Officers of the Army on duty in Porto Rico, whether on the island or on army transports or merchant steamers or naval vessels in the vicinity, or in transit to or from the island, were during the time of these maneuvers in receipt of the ten per cent increase provided by the act of 1901. On the island they lived in quarters furnished by the Government, or received commutation therefor. The winter climate is delightful, and the country as peaceable as any region under the American flag; yet the Army officers received an increase of ten per cent on their pay.

The officer of the Navy engaged in these maneuvers had not even the option which the army officer has of taking his family with him. They must be left at home whether he wanted to or not. He was obliged to keep up two separate establishments, one at home, the other at his post of duty. No contribution was made by the Government to his mess bills as was done prior to the Personnel Act by way of the sea ration or commutation therefor. (*Gibson* v. *United States*, 194 U. S. 182, 192.)

He had another expense to which the army officer was

not subjected. Vessels of other nations were present at these maneuvers. Their officers were the guests of ours. No "table money," allowance for servants, or other such provision for expense of entertainment was provided by the Government for our officers, as is the case with other navies. (House Report 1375, 55th Congress, 2d Session, being report on bill which afterwards became the Navy Personnel Act, pp. 95–97.) All the expense of entertainment had to be provided from their own pockets.

Shall they be deprived of the one increase which the law allows to officers "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto"? And if they are deprived of it while officers of the Army in the same locality are getting it, are they receiving "the same pay and allowances as the officers of corresponding rank in the Army"?

Army Duty Abroad Strictly Normal.

The whole defense of the United States, as disclosed by the able brief of the learned Assistant Attorney-General, is based upon the idea that the officers of the Army are performing some extra or abnormal duty in serving beyond the limits of the home States and Territories, while those of the Navy are doing only their ordinary and regular service.

A legal distinction can not, it is submitted, be based upon the idea of duty being either normal or abnormal. In fact, as well as in law, the duty in both services is strictly normal. The Army and the Navy together constitute the military force of the United States. The terms of their engagement in either service require them to serve wherever they may be ordered. The Army has always been regularly and usually employed in guarding our outlying possessions. Before the completion of the trans-

continental railroads a large proportion of the officers of the Army were always serving in regions far more difficult of access and less civilized than the Philippine Islands are to-day. For many years after the acquisition of Alaska, the Army was the sole representative of the authority of the United States in that country. For such services the officers of the Army received no increase of their pay any more than did those of the Navy. But there was nothing abnormal or unusual about the service, nor is there anything abnormal or unusual in the service of the Army in the Philippines, or other outlying regions to-day. The service is as much a part of their regular duty as is the service of the Navy in the waters of our outlying possessions or of foreign countries. Each is a part of the officer's expected and anticipated duty. Neither would have any legal ground of complaint if Congress had failed to increase the pay in consideration of such service. But when Congress does make service in such regions of the world a condition of increase in the case of the Army, the Personnel Act assures to the Navy the benefit of the same increase.

Purpose of the Personnel Act.

The achievements of our Navy in the war with Spain awakened Congress to the propriety of placing its officers upon an equality with those of the Army in the matter of compensation. Had the acts we are considering been in force at the date of the battle of Manila Bay, May 1, 1898, Commodore, now Admiral, Dewey and his fellow-officers who achieved for us the conquest of those islands, would have been entitled on the theory of the defense to less pay by ten per cent than the officers of the Army who came after them and followed up their victory. Congress recognizing the justice of a plea for equality between the two services, abolished the distinctions between them and directed that not only the existing pay table of the Army

but all future changes in that pay table should apply to the Navy.

Views of Assistant Secretary of Navy Roosevelt.

Hon. Theodore Roosevelt in a report made by him as Assistant Secretary of the Navy embodied in that of the House Committee on Naval Affairs on the bill which became the Personnel Act thus gave the reasons for recommending the adoption of the army pay table for the line of the Navy:

"Furthermore, the pay of the officers has been graded so as to make it equal to the pay of the other servants of the Government engaged in similar duties. At present the line of the Navy is the most poorly paid branch of the entire Government in proportion to the duties performed and the responsibilities involved. It is difficult to speak with proper restraint of a system which cuts down below the pay of all similar servants of the Government the scanty salaries of those men to whose valor, energy, and lifelong zeal the honor of the nation is especially entrusted. The engineers are paid at a much higher rate than the line officers; and in the event of the two corps being combined it is certainly desirable to raise the pay of the old line officers rather than to diminish the pay of the old engineers. All that has been done is to equalize matters by giving the new body the pay now granted to the marine officers and the Army. At present the anomalies in the Navy are grotesque. Out of a given number of graduates from Annapolis the men who go into the line—the men out of whom we are to make the Perrys, Footes, and Hulls of the future—are paid the smallest rate of all. The men who take charge of the marines are paid more, and most of all is paid to those who stay ashore to build the ships which the others handle.

"In one of the offices of the Navy Department at present there is on duty a graduate of Annapolis, a line officer who receives a salary of $2,400. One of the junior assistant constructors also on shore duty is this officer's

son, also a graduate of Annapolis some twenty-five years later than his father graduated. They will both receive a raise of pay next year, and their rates of pay will then be precisely the same. In the Department here at Washington one of the naval aids on duty graduated from Annapolis twenty-three years ago. One of the assistants who is in the construction department graduated six years ago. He receives $400 more than the naval aid, who was his instructor at the Academy during the period that he was there. Most emphatically there should be no cutting down in the salaries of any of the other officers; but those of the line officers should be raised. It must be remembered that with smaller salaries the line officers have greater calls made upon them. When our ships are abroad, or when foreign ships are in port, our officers often have to entertain the officers of foreign powers; and they are too proud of their ships not to do this entertaining in the way that it should be done, though it forms a very serious drain upon their slender purses." (House Report No. 1375, 55th Congress, 2d Session, pp. 28, 29.)

Report of House Committee on Naval Affairs.

The elaborate report submitted to the House of Representatives by Mr. Foss from the Committee on Naval Affairs, May 19, 1898, on House Bill No. 10,403, which with some amendments became the Personnel Act, says under the head of "Pay":

"The committee, after careful consideration, recommend that the pay of the new line should be made the same as that of the Marine Corps or the infantry of the Army. They believe that there could not be a more appropriate time for putting the pay question on a proper basis than the present, when the personnel of the Navy is being reorganized, in order that, all questions affecting the personnel having been settled by this bill, Congress would not be called upon to legislate for the Navy for a long time to come.

"The committee examined this question of pay with the greatest care and recommended the adoption of army

pay as provided in the original draft of the bill. The army pay table has been in use for a long time, and has given satisfaction to the officers who are paid under it. While there are features which doubtless admit of improvement, it is believed to be much better to adopt for the Navy a system which has already been applied satisfactorily for many years to a sister service than to attempt to prepare a new pay table, even if it might theoretically be more perfect than the one recommended.

"The following is a brief statement of some of the reasons which have convinced the committee:

"1. As an amalgamation of officers is being made who have heretofore been paid differently, and as their positions are to be the same, the adoption of some scheme of pay which will be fair to all is important.

"2. The adoption of either of the present pay tables would cause a reduction of pay to a great many officers of both branches.

"3. The present pay tables were devised twenty-five years ago to suit a condition of affairs then existing, but which has materially changed.

"4. Neither of the present pay tables is constructed on a really proper basis, and the amount of pay an officer will receive is almost a lottery—depending too much on variation in promotion.

"5. The Marine Corps (Army) pay table is based, partly at least, on length of service from the very commencement, a principle which any fair rate of pay should embody.

"6. This scheme has prevailed for at least thirty years in the Army and Marine Corps and has given great satisfaction.

"7. The ranks in the two services (Army and Navy) are the same, and the duties and responsibilities of the Navy are at least as great as those of the Army, so that in all fairness it would seem that the pay should be the same.

"8. Certain expenses incumbent on naval officers are, from the nature of their duty, greater than those of army officers, so that a greater rate of pay would be indicated. What is provided for is not quite equality, as all the allowances are not given.

"2. The adoption of a pay table for a similar military service obviates the necessity of a great deal of detailed work in preparing a new one, and makes the portion of a bill dealing with the subject short and easily understood." (House Report 1275, 58th Congress, 2d Session, pp. 9, 10.)

Application of These Views to Personnel Act.

It will be observed that one of the very reasons supporting the passage of such a measure in the opinion of the Committee was to obviate the necessity for pay legislation specially affecting the Navy. At the same time it was admitted (Paragraph 8 above) that "certain expenses incumbent on naval officers are from the nature of their duty greater than those of army officers," so that "what is provided for is not quite equality." Could there be a better answer to the suggestion made on behalf of the United States that the officer of the Navy at sea has not as great expenses to meet as the Army officer on shore?

The legislation is evidently of the very character designed by the framers of the Personnel Act to apply to the Navy.

Mode of Calculating Increases.

No Inequality with Army.

It is contended in this case on behalf of the claimant (brief for Thomas, claimant, Part II, pp. 46–52) that he is entitled to have his ten per cent increase calculated upon his entire pay, including all longevity increases. The officer of the Army has the same right. There is no force in the contention made in the brief for the United States (pp. 21–22) that there is an inequality of $200 a year between the army officer receiving his increase merely upon grade pay. The decision of the court on this question will affect the Army equally with the Navy.

Congressional Disapproval of Definition.

A decision of the Comptroller is cited in the brief for the United States (pp. 28–29) to show that the expression "pay proper" includes only the minimum or grade pay and excludes all longevity increases. The principal argument made in that decision is that Congress in the act making appropriation for the support of the Army for the year ending June 30, 1899, approved March 2, 1898, appropriated separately "for pay proper of enlisted men" and for "additional pay for length of service," thus contrasting "pay proper" and "additional pay for length of service."

This decision was rendered June 2, 1899 (2 Comptroller's Decisions, 888). At the very next session of Congress the form of appropriation was changed. In the appropriation act of March 3, 1899, it assumes this form (30 Stat. L. 1007):

"Pay of enlisted men of all grades, including recruits, fifteen million five hundred thousand dollars.

"For additional pay for length of service, seven hundred and twenty-five thousand dollars."

The same form of appropriation continues in the Army appropriation acts of May 26, 1900 (31 Stat. L. 206); March 2, 1901 (31 Stat. L. 895); June 6, 1902 (32 Stat. L. 331); March 3, 1903 (33 Stat. L. 1028), and April 23, 1904 (33 Stat. L. 264). Thus Congress seems to have recognized the impropriety of appearing to contrast "pay proper" and "additional pay for length of service." That form of expression was abandoned as soon as attention was called to it.

No such contrast was ever made in the appropriations for pay of officers. The form for such appropriation for a fiscal year so far back as the act considered by the Comptroller, that of 1899 (30 Stat. L. 1215),

"For pay of officers of the line, two million eight hundred and sixty-five thousand dollars.

"For pay of officers for length of service, to be paid with their current monthly pay, seven hundred and ninety thousand dollars."

This form has ever since continued, as shown by the appropriation acts referred to.

Thus Congress, both as to the officers and enlisted men, has shown no disposition to treat longevity pay as anything to be distinguished from "pay proper."

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